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In the Supreme Court of the United States

OCTOBER TERM, [redacted] 1970

No. [redacted] 21

MORTIMER NORMAN KORAN,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

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Petitioner prays that a writ of certiorari issue to review the decision and judgment of the United States Court of Appeals for the Fifth Circuit.

OPINION BELOW

The Opinion of the United States Court of Appeals for the Fifth Circuit, affirming Petitioner's conviction, has not yet been reported, but may be found in Appendix G.

GROUNDS FOR JURISDICTION

The Sentence and Judgment of conviction of the United States District Court for the Southern District of Florida was entered on October 27, 1967. (Appendix E) The Judgment of the United States Court of Appeals for the Fifth Circuit was entered on January 27, 1969. (Appendix H). The Order Denying Petition For Rehearing was entered on March 28, 1969 (Appendix I), at which time the decision became final.

Justice HUGO L. BLACK extended the time for Filing Petition For Writ of Certiorari to and including May 27, 1969. (Appendix J).

The Jurisdiction of this Court is invoked under 28 U.S.C. 1257 (3), because a title, right, privilege or immunity claimed under the Constitution of the United States was denied by the United States Court of Appeals for the Fifth Circuit. The Jurisdiction of this Court is further invoked under 28 U.S.C. 1254 (1), in view of the conflict between the decision of the Fifth Circuit herein and that of the Seventh Circuit in **United States vs. White,** 405 F. 2nd 838 (7th Cir. 1969).

QUESTION PRESENTED

Though the electronic surveillance of petitioner occurred prior to the decision in Katz vs. United States on December 18, 1967, does the introduction into evidence of tape recordings of oral and telephone conversations of petitioner, when petitioner elects not to testify at his trial, constitute a violation of his rights under both the fourth and fifth amendments.

CONSTITUTIONAL STATUTORY AND RULES PROVISIONS INVOLVED

CONSTITUTION OF THE UNITED STATES

AMENDMENT IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

TITLE 28 UNITED STATES CODE

SECTION 1254 (1)

Cases in the Courts of Appeals may be reviewed by the Supreme Court by the following methods:

(1) By Writ of Certiorari granted upon the Petition of any party to any civil or criminal case, before or after the rendition of Judgment or Decree.

TITLE 28 UNITED STATES CODE

SECTION 1257 (3)

Final Judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows: By Writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.

RULES OF THE SUPREME COURT OF THE UNITED STATES

RULE NO. 19 (1) (b)

Where a court of appeals has rendered a decision in conflict with the decision of another court of appeals on the same matter; or has decided an important state or territorial question in a way in conflict with applicable

state or territorial law; or has decided an important question of federal law which has not been, but should be, settled by this court; or has decided a federal question in a way in conflict with applicable decisions of this court; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision.

STATEMENT OF THE CASE

In June, 1966, Petitioner was a printer engaged in business in Hallandale, Broward County, Florida. The City of Miami Police and the Florida Highway Patrol were conducting an investigation of counterfeit Florida drivers' licenses, and during such investigation the two departments cooperated with the United States Secret Service, who were investigating counterfeit currency. (R. 59, 98) Pursuant to their combined plans, an informer was equipped with an electronic device on his person, and he was sent to Petitioner's place of business to discuss counterfeiting. Their conversation was overheard and recorded by government agents who stationed themselves nearby, but outside the premises. (R. 26-28).

The next day, the informer telephoned Petitioner at his place of business, but the informer's telephone was equipped with an electronic eavesdropping device, and the conversation was likewise overheard and recorded by other agents (R. 68-82). During the next few days, the undercover agent initiated several telephone calls to Petitioner, and these telephone conversations were also overheard and recorded. (R. 87-89)

The Defendant was later charged on a Six Count Indictment for violation of Title 18, U. S. Code, Section 474. (Appendix A). Prior to trial, Petitioner's Motion to Suppress raised the constitutional question (Appendix B). The Motion was primarily directed toward (1) the oral conversation between the informer and Defendant in Petitioner's place of business, (2) the oral conversations between the government agent, the informer and Petitioner, not at Petitioner's place of business, and (3) the telephone conversations between the informer and the government agent, on the one hand, and Petitioner, which calls were made to, not from, Petitioner at his place of business. The Trial Court denied Petitioner's Motion to Suppress as to all conversations (R. 24-38).

At the trial, the Government introduced testimony of the government agents as to all of the above oral and telephone conversations of Petitioner, which they overheard, and in addition, the Government introduced into evidence tape recordings of same and played them to the jury (R. 157-215) over Petitioner's objections (R. 125-139) and Motion for Mistrial (R. 125-139, 215).

Neither Petitioner or the informer testified at the Hearing on the Motion To Suppress or at the Trial.

Petitioner was found guilty of two counts, making a print of a one dollar Silver Certificate, and being in possession of same, and was sentenced to a term for five years on each Count, the sentences to run concurrently. (Appendix E)

Petitioner appealed to the United States Court of Appeals for the Fifth Circuit, (Appendix F) and again

raised the constitutional questions in his Brief. The conviction was affirmed, (Appendix G), and the Petition For Rehearing, which was denied on March 27, 1969, (Appendix I) also raised the constitutional questions.

REASONS FOR GRANTING THE WRIT

A. Fifth Amendment Rights

There is now no question that the government's electronic eavesdropping activities in the instant case were clearly violative of Petitioner's Fourth Amendment rights. In prior arguments to the lower Courts, Petitioner has relied heavily upon **Katz vs. United States** 389 U. S. 347, 88 S.Ct. 507 (1967), but if it were not for this Court's prospective application of the **Katz** rule in **Desist vs. United States,** ____ U. S. ____ (March 24, 1969), Petitioner's conviction herein would undoubtedly be reversed. This Court's statement that "**Katz** is to be applied only to cases in which the prosecution seeks to introduce the fruits of electronic surveillance conducted after December 18, 1967," has now made it futile to argue here what has been foreclosed.

There are, however, major factual differences between the present case and **Desist,** which, Petitioner urges, distinguish this case from the harsh and unjust results of **Desist,** and bring into focus the Fifth Amendment question. **Desist** was not clear as to whether the Defendants therein did or did not testify in their own behalf, other than this Court's pronouncement "an important part of the Government's evidence consisted of tape recordings of conversations among several of the Petitioners in a New York City hotel room." The lower Court, however,

indicated that several of the Defendants offered affirmative testimony and evidence, including an alibi, which may well have included direct testimony by the Defendants.

It is Petitioner's contention that the Fifth Amendment demands a Defendant should "not be compelled in any criminal case to be a witness against himself." To give full meaning to the rights created under such Amendment, the illegally seized tape recordings of oral and telephone conversations of Petitioner, which contained many incriminating statements by Petitioner, should not have been introduced into evidence and played to the jury, until and unless Petitioner elected to testify at the trial. In the event Petitioner waived his rights and did elect to testify, the tape recordings could then be introduced into evidence to impeach the testimony of Petitioner.

If the above were not the rule, then Courts are merely giving lip service to a defendant's Fifth Amendment rights, in that the practical effect, as was the case here, would be to permit the jury to actually hear a Defendant's own incriminating statements convict him, when he has not yet had the opportunity to make an intelligent decision whether to make or not to make any statement.

In **Berger vs. State of New York,** 388 U.S. 41, 87 S.Ct. 1873 (1967), Justice Douglas, in his concurring opinion, stated at page 67:

> "The words that a man says consciously on a radio are public property. But I do not see how government using surreptitious methods can put

a person on the radio and use his words to convict him. Under our regime, a man stands mute if he chooses, or talks if he chooses. The test is whether he acts voluntarily. That is the essence of the face of privacy protected by the 'mere evidence' rule. For the Fourth Amendment and the Fifth come into play when the accused is 'the unwilling source of the evidence' . . . there being no difference 'whether he be obliged to supply evidence against himself or whether such evidence be obtained by an illegal search of his premises and seizure of his private papers . . .

" . . . in short, I do not see how any electronic surveillance that collects evidence or provides leads to evidence, is or can be constitutional under the Fourth and Fifth Amendments . . ."

This Court has gone to great extreme to extend Constitutional rights of Defendant outside the courtroom by limiting the use of extrajudicial statements made by such Defendant. In **Miranda vs. State of Arizona,** 384 U. S. 436, 86 S.Ct. 1602 (1966), this Court stated at Page 460:

" . . . All these policies point to one overriding thought: the constitutional foundation underlying the privilege is the respect a government—state or federal—must accord to the dignity and integrity of its citizens. To maintain a 'fair state-individual balance,' to require the government 'to shoulder the entire load,' . . . to respect the inviolability of the human personality, our accusatory system of criminal justice demands

> that the government seeking to punish an individual produce the evidence against him by its own independent labors, rather than by the cruel, simple expedient of compelling it from his own mouth . . . In sum, the privilege is fulfilled only when the person is guaranteed the right 'to remain silent unless he chooses to speak in the unfettered exercise of his own will' . . ."

Further, this Court in **Linkletter vs. Walker,** 381 U. S. 618, 85 S.Ct. 1731, (1965), discussed the retrospective application of new criminal rules, and stated at P. 1743:

> " . . . finally in each of the three areas in which we have applied our rule retrospectively, the principle that we applied went to the **fairness of the trial** . . ." (Emphasis Added)

And, in **Desist,** this Court stated the exclusionary rule under the Fourth Amendment is but a "procedural weapon that has no bearing on guilt" and "the fairness of the trial is not under attack."

Petitioner submits that if a defendant elects not to testify, the prosecution has the burden of carrying forward the prosecution without the defendant's own voice and words making up the primary evidence for his conviction. It is respectfully submitted that the "fairness of the trial" is clearly under attack if such a procedure is used.

B. Conflict of Decisions

This case was prepared for submission to this Court prior to March 24, 1969, the date of the **Desist** ruling, on a clear conflict of decisions between two Courts of Appeals, on almost identical factual situations, in their interpretation of **Katz vs. United States, supra.**

In **United States vs. White**, 405 F. 2nd 838 (Jan. 7, 1969), the Seventh Circuit, in banc, reversed a conviction wherein identical electronic eavesdropping devices were used by the government, also prior to December 18, 1967. There, a device was placed on an informer, who visited White's place of business, and met with him on several occasions at other places. In addition, a device was placed on a telephone the informer used to call White at his home and place of business. All of White's conversations were overheard by Government agents. The informer was not called as a witness, as was the case here, but the Government agents testified as to the incriminating statements overheard by them through the use of the electronic eavesdropping devices.

The Seventh Circuit's decision, reversing the conviction, distinguished all prior cases relied on by goverment to justify the use of electronic devices. The Court stated that **Lopez vs. United States** 373 U. S. 427, 83 S.Ct. 1381 (1963), merely held that tape recordings of oral conversations could be used only to corroborate the prior testimony of an agent or an informer, and since the informer did not testify, the tape recordings could not be authorized. The Court also stated that **On Lee vs. United States** 343 U.S. 747, 72 S.Ct. 967 (1952) may have been applicable if this Honorable Court had not destroyed the effectiveness of the decision over the past several years and "completely eroded the decisional basis of **On Lee.**"

The Fifth Circuit Court recognized their divergent point of view by stating:

> "We are, of course, aware that our analysis of Katz is in conflict with a Seventh Circuit decision . . . **United States v. White** ____F. 2nd _____ (7th Cir. 1968) . . ."

It is Petitioner's contention that even if this Court had not ruled on the **Katz** and **Desist** cases, and if the only case to come before this Court involved the government's use of electronic eavesdropping devices on telephones, when telephone calls are made to, not from, defendant's home or place of business, this Court, under the existing case law, would still have held that the search and seizure provisions of the Fourth Amendment and the Fifth Amendment were violated by the government agents, would have upheld the Seventh Circuit's decision, and would have reversed the Fifth Circuit.

It is further submitted that Justice Harlan was prophetic when he challenged the majority, in his dissenting opinion in **Desist**, as follows:

> "The unsound character of the rule reaffirmed today is perhaps best exposed by considering the following hypothetical. Imagine that the Second Circuit in the present case had anticipated the line of reasoning this Court subsequently pursued at . . . concluding—as this Court there did—that 'the underpinnings of Olmstead and Goldman have been so eroded by our subsequent decisions that the 'trespass' doctrine there enunciated can no longer be regarded as controlling . . . Would we have reversed the case on the ground that the principles the Second Circuit had announced—though identical with those in Katz—should not control because Katz is not retroactive? To the contrary, I venture to say that we would have taken satisfaction that the lower Court had reached the same conclusion we subsequently did in Katz. If a 'new' constitutional

> doctrine is truly right, we should not reverse lower courts which have accepted it; nor should we affirm those which have rejected the very arguments we have embraced. Anything else would belie the truism that it is the task of this Court, like that of any other, to do justice to each litigant on the merits of his own case. It is only if each of our decisions can be justified in terms of this fundamental premise that they may properly be considered the legitimate products of a court of law, rather than the commands of a super-legislature."

What Justice Harlan has prophesized has come true. The Seventh Circuit, in **United States vs. White**, supra, ruling on the identical factual situation as is presented here, and "anticipating the line of reasoning this Court subsequently pursued," decided that "the underpinnings of Olmstead and Goldman have been so eroded by our subsequent decisions that the 'trespass' doctrine there enunciated can no longer be regarded as controlling".

Can this Honorable Court now say that the Seventh Circuit was wrong in setting Mr. White free, and the Fifth Circuit is correct in sending Mr. Koran to prison, when both were convicted on the same illegally obtained evidence. This is not "justice to each litigant on the merits of his own case."

CONCLUSION

Petitioner respectfully submits that even without the benefit of **Katz** and **Desist,** and the conflict between the Fifth and Seventh Circuits, the existing case law clearly sets forth that the illegally obtained evidence used to convict Petitioner, was a clear violation of his constitutional rights under both the Fourth and Fifth Amendments.

Respectfully submitted,

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